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No. 80-6680

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES RONALD McELROY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

WHETHER SECTION 2314 OF TITLE 18 OF THE UNITED STATES CODE REQUIRES THE GOVERNMENT TO PROVE THAT THE SECURITY WAS IN A FALSELY MADE OR FORGED CONDITION AT THE TIME OF ITS INTERSTATE TRANSPORTATION TO SUSTAIN A CONVICTION UNDER THAT PORTION OF SECTION 2314 PROSCRIBING THE TRANSPORTATION IN INTERSTATE COMMERCE OF FALSELY MADE OR FORGED SECURITIES.

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BRIEF FOR THE PETITIONER

OPINION BELOW

The judgment of the district court was entered October 15, 1979 (J.A. 1). The opinion of the United States Court of Appeals for the Third Circuit was filed March 17, 1981 and is reported at 644 F.2d 274 (J.A. 78).

JURISDICTION

The United States Court of Appeals for the Third Circuit rendered the judgment sought to be reviewed on March 17, 1981, affirming on direct appeal the criminal conviction of Petitioner McElroy. McElroy did not seek rehearing in the Court of Appeals.

Section 1254(1) of Title 28 of the United States Code confers jurisdiction upon the United States Supreme Court to review the final judgment of the Third Circuit in this criminal case by writ of certiorari.

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 10

> The term "interstate commerce", as used in this title, includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia.
>
> The term "foreign commerce", as used in this title, includes commerce with a foreign country.

Title 18, United States Code, Section 2314

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be

transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

STATEMENT

Charles Ronald McElroy, Petitioner, (sometimes hereinafter referred to as "McElroy"), was indicted on three counts. Counts One and Three charged that in October and December of 1978, respectively, McElroy transported, and caused to be transported in interstate commerce, falsely

made and forged securities from Ohio to Pennsylvania in violation of Section 2314 of Title 18. Count Two charged that McElroy transported "in interstate commerce a stolen motor vehicle. . . from the Western District of Pennsylvania to the State of Ohio," knowing it to be stolen, in violation of Section 2312 of Title 18, United States Code (J.A. 3-4).

The checks involved were stolen in late March or early April of 1977 from the Youngstown, Ohio, office of the Laborer's International Union of North America (J.A. 42-43). These checks were to be drawn on an account in the Dollar Savings and Trust Company of Youngstown, Ohio. Upon discovery of the theft, the Union closed the account on which the checks were to be drawn (J.A. 45).

In October of 1978, approximately 17 months after the checks were stolen, McElroy appeared at the Don Allen Chevrolet Agency in Pittsburgh, Pennsylvania, and, using a fictitious name, ordered a used Corvette, and agreed to a price of $6,706. He told the salesman that he lived in Warrensville Heights, Ohio, but worked in the Pittsburgh area (J.A. 6-7). He told the salesman that he would acquire a credit union check in the amount of the sale price, and return the next day (J.A. 7). He returned the next day and tendered a check in the proper amount drawn on the Dollar Savings Bank in Youngstown, Ohio (J.A. 8). He asked that the car be titled in Ohio and signed forms to that effect (J.A. 12-13). McElroy then drove off in the automobile. Company personnel called the drawee bank the next day, and learned that the account had been closed; and did not, therefore, attempt to negotiate the check (J.A. 53).

In December of 1978, McElroy appeared at the Rini Boat Sales Company in Beaver Falls, Pennsylvania, and inquired about the purchase of a boat (J.A. 20). He telephoned about a week later and told the dealer that he was going to buy the

boat and a trailer, but that he had to get a check from his credit union (J.A. 20). He telephoned later that same day to inform Philip Rini that he was at a rest stop on the Ohio Turnpike,[1] and asked Rini to wait for him (J.A. 21). An employee of Rini's, James Glenn Diamond, testified that he saw McElroy pull out of a dead-end street before driving to the Rini Sales Office (R. 112).

McElroy arrived at the boat sales office in a pick-up truck bearing Ohio license plates (J.A. 21). He delivered a check already imprinted with the sale price of $6,909 (J.A. 21-22). The signature on the check was forged. As in the case of the sale at Don Allen's Chevrolet, McElroy used a fictitious name (J.A. 20-21). Rini accepted the check that evening, and the next day he called the drawee bank and learned that the account had been closed. He, therefore, did not attempt to negotiate the check (J.A. 31).

FBI Agent Gordon Johnson testified that McElroy told him in an interview, that during October of 1978, McElroy lived and worked in East Liverpool, Ohio (J.A. 56).

At the conclusion of all the evidence, defense counsel moved for judgment of acquittal as to Count Two, on the ground that the Government had failed to prove that McElroy had transported the vehicle from Pennsylvania to Ohio, and as to Counts One and Three, that the Government had failed to prove that the check was in a forged condition before it was transported from Ohio to Pennsylvania (R. 68A-71A). These motions were denied. The defense rested without introducing any evidence or calling any witnesses. The Court charged with respect to Counts One and Three:

---

[1]No evidence was introduced to show the distance between any rest area on the Ohio Turnpike and the Rini Boat Sales Company in Beaver Falls, Pennsylvania.

"Now, if you believe that the Government has shown that the Defendant transported the checks while they were in a forged condition within the State of Pennsylvania, the requirements of the law are satisfied if that transportation was part of interstate commerce. In other words, the check had to originate at sometime in Ohio and had to have been transported at sometime in Pennsylvania in order to effect interstate commerce. So the Government must prove this Defendant transported the checks involved in Counts 1 and 3 of the indictment in interstate commerce between Ohio and Pennsylvania, but need not prove the place in Ohio from which the checks started or from where the Defendant started." (R. 164A-165A).

Following the charge, defense counsel objected to the refusal of the Court to read his Points for Charge (J.A. 77), including point 1, which required proof that the checks traveled from Ohio to Pennsylvania in a forged or altered state. In addition, he objected to the fact that with regard to the car and checks, that the Court had failed to charge that the Government had the burden to prove that McElroy caused the transportation of the checks from Ohio to Pennsylvania.

After some discussion with counsel (R. 173A-179A), the court added to its charge on the interstate commerce element the following:

". . . . As to Counts 1 and 3, the Government must prove with evidence that convinces you beyond a reasonable doubt that the Defendant caused the transportation of the two checks in question, that is, in Counts 1 and 3, the check to Rini, the check to Don Allen Chevrolet, in interstate commerce, from Ohio to Pennsylvania.

"Now, also, the Government, as to Count 2, the Government must prove and with evidence that con-

vinces you beyond a reasonable doubt that the 1974 Chevrolet Corvette was transported into Ohio from Pennsylvania."

"... . The Government need not prove any particular reason for the document's lack of authenticity, for the purpose of the statute is to prohibit the fraudulent introduction into commerce, that is, pass a check like this, to carry it across the state line, to prohibit the fraudulent introduction into commerce of falsely made documents regardless of the precise method of causing the lack of authenticity. By 'authenticity,' that means lack of genuineness." (R. 181A-182A).

Defense counsel objected to this charge and the court overruled the objection (J.A. 64). The jury convicted McElroy on all counts, and he was sentenced to the custody of the Attorney General for a term of imprisonment of five years on each count, to run concurrently with each other.

The panel of the court of appeals deferred ruling after hearing oral argument, and the case was re-argued before the court of appeals in banc.

The majority of the court of appeals ruled that there was insufficient evidence on the Dyer Act count, but ruled that as to Counts One and Three, the trial court was correct in rejecting McElroy's contention that the check had to be in a forged condition before it was transported from Ohio to Pennsylvania, thereby rejecting the holdings in the Courts of Appeals for the Fifth, Eighth, and Tenth Circuits (J.A. 87-88).

Judge Adams and Seitz dissented from the holding by the majority that the Dyer Act count should be dismissed (J.A. 89-91).

Judge Garth dissented from the affirmance of Counts One and Three on the grounds there was insufficient evidence to

support the convictions under the majority theory; but agreed with the majority's interpretation of Section 2314 (J.A. 91-97).[2]

Judge Higginbotham concurred with the majority in its holding on Count Two, but dissented from the affirmance of Counts One and Three. Judge Higginbotham found that the statute was ambiguous and would have resolved this ambiguity in favor of lenity and the view expressed by the Fifth, Eighth, and Tenth Circuits (J.A. 97-100).

SUMMARY OF ARGUMENT

The court of appeals held that it was not necessary for the Government to prove that the checks were in a forged condition before their transportation in interstate commerce, and held:

> "It is immaterial whether the signatures were forged in Ohio or in Pennsylvania. If at any point in the interstate movement the check was in a forged condition, the statute was satisfied." (J.A. 86).

(1) McElroy's primary argument is there is no ambiguity in the statute. A plain or literal reading of the third paragraph of the statute, clearly requires that the security must be falsely made or forged before it is transported in interstate commerce in order for a violation of this statute to occur. The Courts of Appeals for the Fifth, Eighth, and Tenth Circuits have agreed with this position: *United States v. Sparrow*, 635 F.2d 794 (10th Cir. 1980) (in banc); *United States v.*

[2]Petitioner has raised the question of the sufficiency of the evidence in his Petition for Certiorari, but this Court has limited the granting of the writ to the question presented.

Hilyer, 543 F.2d 41 (8th Cir. 1976); *United States v. Owens,* 460 F.2d 467 (5th Cir. 1972); *See also United States v. Lee,* 485 F.2d 41 (4th Cir. 1973). The text of the third paragraph of the statute indicates by the use of verbs in the past tense, "made", "forged", "altered", or "counterfeited", and in the present perfect tense, "knowing the same to have been falsely made, forged, altered, or counterfeited," that this paragraph clearly aims at acts that have already been committed, prior to the transportation in interstate commerce. Nor does Section 10 of Title 18, United States Code, which defines interstate commerce as including "commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia," change the clear meaning of the statute that the security must be in a falsely made or forged condition prior to its transportation in interstate commerce.

Furthermore, it is a rule of long-standing in this Court that criminal statutes are to be strictly construed *e.g., United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76, 95-96 (1820).

A review of the legislative history indicates that Section 2314 had its genesis in Section 3 of the National Stolen Property Act, May 22, 1934, ch. 333, 48 Stat. 794, which had virtually the same interstate commerce language now contained in Section 2314. Section 2315, which had its genesis in Section 4 of the National Stolen Property Act, used the terms "moving as, or which are part of, or which constitute interstate or foreign commerce, ..." Therefore, Congress did not intend to broaden the scope of Section 2314.

(2) Although Petitioner does not believe that the statute is ambiguous, if there is any ambiguity, it must be resolved in favor of lenity, *e.g., United States v. Bass,* 404 U.S. 336

(1971). The three circuit courts that have squarely ruled on this question have relied upon this rule. The purpose of the paragraph in question, which had its origin in the National Stolen Property Act, is set forth in *United States v. Sheridan,* 329 U.S. 379 (1946). There the court indicated that the purpose of this Section was to assist the states in preventing frauds as well as capturing those who use the channels of interstate commerce to effect an escape. Regardless of the broad purpose Congress had in passing the Act, paragraph 3 of Section 2314 is directed at the interstate transportation of forged securities and not securities that are forged at some later time.

(3) The majority opinion of the court of appeals below ignores the "double-barreled" past tense and present perfect tense language utilized in the statute that establishes that the aim of the drafters was to punish those who transported in interstate commerce forged or falsely made securities. Moreover, the opinion makes no mention of the well-founded canons of statutory construction.

"The rule that penal statutes are to be construed strictly, is perhaps not much less old than construction itself." *United States v. Wiltberger, supra,* 18 U.S. (5 Wheat.) at 95 (Marshall, C.J.). The rule of lenity in the construction of ambiguous penal statutes is founded on firm public policy. *United States v. Bass, supra,* 404 U.S. at 348-349.

Instead, the opinion relies primarily on cases construing Section 2315, which makes it a crime to receive, conceal, store, barter, securities or other goods, "moving as, or which are a part of, or which constitute interstate or foreign commerce, ..." This language is completely dissimilar and broader than the language used in paragraph 3 of Section 2314.

(4) As stated above, paragraph 3 of Section 2314 was originally part of the National Stolen Property Act, and was enacted in 1934. As early as 1961, the Fifth Circuit in *Castle v. United States*, 287 F.2d 657 (5th Cir. 1961), indicated that no federal offense under Section 2314 would be cognizable unless the forgery took place before the securities were transported from one state to another. Then, in *United States v. Owens, supra*, the Fifth Circuit squarely held that in order to violate Section 2314, it must be proven that the checks were in a forged condition prior to their entry to interstate commerce. In light of the inaction by Congress in the face of this interpretation placed on these statutes in question, it is submitted that the Court may presume that Congress has approved these interpretations of the statutory language involved.

ARGUMENT

THE THIRD PARAGRAPH OF §2314, 18 U.S.C. REQUIRES THAT THE PROSECUTION PROVE THE CHECKS WERE FORGED PRIOR TO THEIR TRANSPORTATION IN INTERSTATE COMMERCE.

McElroy was indicted and convicted of violations of the third paragraph of Title 18, Section 2314.

The district court and the Court of Appeals for the Third Circuit interpreted the statute as not requiring the prosecution to prove that the check[3] was in a forged condition before its transportation in interstate commerce, so long as at

[3]A check is included with the definition of "security" as that term is used in Chapter 113 of Title 18. See §2311 of Title 18.

some time before its interstate movement terminated, it was in a forged condition.

McElroy submits that the correct reading of this statute requires the Government to prove that the security was in a forged condition prior to its transportation in interstate commerce, *i.e.*, before it crosses a state line, which is the reading adopted by the Court of Appeals for the Tenth Circuit, *United States v. Sparrow*, 635 F.2d 794 (10th Cir. 1980) (in banc); by the Eighth Circuit, *United States v. Hilyer*, 543 F.2d 41 (8th Cir. 1976); and by the Fifth Circuit, *United States v. Owens*, 460 F.2d 467 (5th Cir. 1972). *See also United States v. Lee*, 485 F.2d 41 (4th Cir. 1973).

The reasons McElroy would advance for this construction of the statute will be discussed seriatim:

A. A Literal Reading of the Statute, Which Must Be Strictly Construed, Requires that the Government be Required to Prove that the Securities were in a Forged Condition Before They were Transported in Interstate Commerce.

As was said by this Court in *United States v. Bass*, 404 U.S. 336, 339, "Not wishing 'to give point to the quip that only when legislative history is doubtful do you go to the statute,' we begin by looking to the text itself." (Footnote omitted.)

Here the text indicates, by use of verbs in the past tense, "made", "forged", "altered", or "counterfeited", and in the present perfect tense, "knowing the same to have been falsely made, forged, altered, or counterfeited," that this paragraph of the statute clearly aims at acts that already

have been committed. If Congress intended to have the statute read as interpreted by the Court of Appeals for the Third Circuit, it could have provided:

> Whoever, with unlawful or fraudulent intent, possesses, makes, forges, alters, or counterfeits securities or tax stamps, which are moving as, or which are part of, or which constitute interstate or foreign commerce, knowing the same to have been falsely made, forged, altered, or counterfeited, shall be fined or imprisoned, or both.

This example follows the language used in Section 2315, Title 18, United States Code, on which the majority below relied so heavily.[4]

Furthermore, a review of the statutory amendments reveals no intention on the part of Congress to expand the third paragraph of Section 2314. The National Stolen Property Act, May 22, 1934, *supra,* did not prohibit interstate transportation of forged securities.[5]

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[4]*Cf.* Judge Higginbotham's dissent wherein he suggests that McElroy could have been charged and convicted under the fifth paragraph of Section 2314. (J.A. 98-99).

[5]Sec. 3. Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen or taken, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both.

Sec. 4. Whoever shall receive, conceal, store, barter, sell, or dispose of any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more, or whoever shall pledge or accept as security for a loan any goods, wares, or merchandise, or securities of the value of $500 or more which, while moving in or constituting a part of interstate or foreign commerce, has been stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been stolen or taken, shall be punished by a fine of not more than $10,000 or by imprisonment of not more than ten years, or both.

In 1939, Sections 3 and 4 were amended to include provisions, inter alia, to cover the transportation of falsely made or forged securities and added the following pertinent language:

> " 'Sec. 3. . . . whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited, . . . shall be punished by a fine . . . or by imprisonment. . . or both: . . . .' "
>
> " 'Sec. 4. . . . or whoever shall receive, conceal, store, barter, sell, or dispose of any falsely made, forged, altered, or counterfeited securities, or whoever shall pledge or accept as security for a loan any falsely made, forged, altered, or counterfeited securities, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited, . . . shall be punished by a fine . . . or by imprisonment . . . or both: . . . .' " Act of August 3, 1939, ch. 413, 53 Stat. 1178-1179.

Sections 3 and 4 after the 1948 revision became Sections 2314 and 2315, respectively, without any change in substance.[6]

It is apparent that Congress meant to make two distinct crimes; one (§2314) for transporting an already forged security across state lines, and the other, (§2315) for dealing with forged securities, "moving as, or which are a part of, or which constitute interstate or foreign commerce."

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[6]See reviser's notes, H.R. Rep. No. 304, 80th Cong., 1st Sess., A146, A147, which indicates that only changes in phraseology were intended to be made when the recodification of Title 18, U.S.C. was completed in 1948. Act of June 25, 1948, ch. 645, 62 Stat. 683.

Moreover, the double-barreled past tense and present perfect tense of the verbs of the paragraph in question clearly indicate that the intent of this paragraph was aimed at making it a crime to transport an already forged security in interstate commerce. It is submitted that Congress knew the significance of the language and verb forms it employed. *See Barrett v. United States,* 423 U.S. 212, 216-217 (1976).

The only question that may be left for resolution is, does the phrase, "in interstate commerce" in this statute, in some artful way, change the plain meaning of the statute.

Section 10 of Title 18, United States Code, defines "interstate commerce", to include commerce between any combination of a state, a territory, and the District of Columbia. This definition of interstate commerce as given in Section 10 does not change in any meaningful way the statutory requirement that the forgery be committed before the transportation in interstate commerce, in the light of its legislative history. Section 10[7] consolidated in a single section the various definitions of interstate commerce found throughout Title 18.

The reviser's note indicates that "... the word 'commerce' was substituted for 'transportation' in order to avoid the narrow connotation of the word 'transportation' since 'commerce' obviously means more than 'transportation.' "[8] H.R. Rep. No. 304, 80th Cong., 1st Sess., A7.

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[7]Section 10 was enacted as part of the 1948 Revision and Codification of Title 18, June 25, 1948, ch. 645, 62 Stat. 683 et seq.

[8]The prior definition of "interstate commerce" Section 2(a) of the National Stolen Property Act provided: "The term 'interstate or foreign commerce' shall mean transportation from one State, Territory, or the District of Columbia to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia."

The language of the third paragraph of Section 2314 means that the forgery must take place prior to the transportation. Thus, the broad reading of the term interstate commerce as advanced by the Court of Appeals as applied to this paragraph of the statute, would violate the "natural construction of the language." *Porto Rico Railway, Light & Power Co. v. Mor,* 253 U.S. 345, 348 (1920).

A rule of long standing in this Court is that criminal statutes are to be strictly construed. *See United States v. Enmons,* 410 U.S. 396, 411 (1972) (construing the Hobbs Act); *United States v. Campos-Serrano,* 404 U.S. 293, 297 (1971) (construing the statute prohibiting possession of counterfeit documents used for entry into the United States); *United States v. Laub,* 385 U.S. 475, 480 (1967) (construing Section 251(b) of the Immigration and Nationality Act of 1952, restricting citizens from departing or entering the United States without a valid passport); *United States v. Halseth,* 342 U.S. 277, 280 (1952) (construing the statute prohibiting mailing letters concerning an existing lottery); *United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76, 95-96 (1820) (construing an act that gave the circuit court jurisdiction over manslaughter committed upon the high seas).

Petitioner submits there is no ambiguity in this statute and, therefore, "... there is no justification for indulging in uneasy statutory construction." *Barrett v. United States, supra,* 423 U.S. at 217.

B. Assuming, Arguendo, that the Statute is Ambiguous, Any Ambiguity Must be Resolved In Favor of Lenity.

While McElroy submits that the statute is unambiguous, assuming, *arguendo,* that it is ambiguous, any ambiguity

must be resolved in favor of lenity.[9] *United States v. Bass,* 404 U.S. 336, 347-348 (1971); *Ladner v. United States,* 358 U.S. 169, 177 (1958); *Bell v. United States,* 349 U.S. 81, 83 (1955); *United States v. Five Gambling Devices,* 364 U.S. 441, 449 (1953); *United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218, 221-222 (1952); *McBoyle v. United States,* 283 U.S. 25, 27 (1931) (Holmes J.).

If a statute is found to be ambiguous, then recourse may be had to any material that would aid in its interpretation. *United States v. Fischer,* 6 U.S. (2 Cranch) 202, 204-205 (1805) (Marshall, C.J.); *United States v. Bass, supra,* 404 U.S. at 347. The legislative history in this case indicates that the paragraph in question originally was enacted as part of Section 3 of the National Stolen Property Act, ch. 333, 48 Stat. 794 (1934). The history of Section 3 of the statute and its purpose have been set forth by this Court in *United States v. Sheridan,* 329 U.S. 379 (1946). The Court noted that the National Stolen Property Act was said to be modeled after the National Motor Vehicle Theft Act, ch. 89, 41 Stat. 324 (1919).

With regard to the construction of Section 3 of the National Stolen Property Act, the Court said that the transportation of forged securities was not to be treated any differently than the transportation of any other article proscribed under Section 3 of the Act. *United States v. Sheridan, supra,* 329 U.S. at 384.

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[9]While petitioner submits there is no inherent ambiguity in the statute, it is apparent there would be if the interpretation of the court of appeals would prevail. The ambiguity would arise because a reading of the statute would indicate that the check was required to be forged prior to its journey in interstate commerce, while under the court of appeals' reading the check could be forged at any time it was in interstate commerce. In that sense, McElroy would submit that there is an ambiguity that should be resolved in favor of lenity.

A review of the legislative history before and after the Sheridan case gives no indication that Congress intended to punish the transportation in interstate commerce of unforged checks by virtue of this paragraph of Section 2314.[10]

In fact, the recent rejection by Congress of Senate Bill No. 1437[11] is indicative that Congress has no intention of broadening the scope of federal jurisdiction in the areas covered by the National Stolen Property Act.[12]

Therefore, the paragraph of the statute is not ambiguous, and the legislative history in this case does not look one way and the statute another, *United States v. Scarborough,* 431 U.S. 563, 568 n.6 (1977). If ambiguity exists, it must be resolved in favor of the petitioner.

C. The Court of Appeals' Opinion is Not Supported By Rules of Statutory Construction Governing Penal Statutes, the Legislative History, or Cases.

[10]National Stolen Property Act, May 22, 1934, ch. 333, 48 Stat. 794; as amended Aug. 3, 1939, ch. 413, 53 Stat. 1178; May 24, 1949, ch. 139, §45, 63 Stat. 96; July 9, 1956, ch. 519, 70 Stat. 507; Oct. 4, 1961, Pub.L. No. 87-371, §2, 75 Stat. 802; Sept. 28, 1968, Pub.L. No. 90-535, 85 Stat. 885.

H.R. Rep. No. 2528, 70t Cong., 2d Sess. (1929); S.Rep. No. 538, 73d Cong., 2d Sess. (1934); H.R. Rep. No. 1462, 73d Cong., 2d Sess. (1934); H.R. Rep. No. 1599, 73d Cong., 2d Sess. (1934); H.R. Rep. No. 422, 76th Cong., 1st Sess. (1939); S.Rep. No. 674, 76th Cong., 1st Sess. (1939); H.R. Rep. No. 2474, 84th Cong., 2d Sess. *reprinted in* [1956] U.S. Code Cong. & Ad. News 3036; S.Rep. No. 1086, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News 3264; H.R. Rep. No. 1728, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. Code Cong. & Ad. News 3654.

[11]*See* S.1437, 95th Cong., 2d Sess. (1978).

[12]*See* Quigley, *The Federal Criminal Code Revision Plan: An Epitaph for the Well-Buried Dead,* 47 GEO. WASH. L. REV. 459 (1979).

The majority opinion of the court of appeals ignores completely the well-established rules of statutory construction endorsed by this Court, governing criminal statutes, *i.e.*, the rule of strict construction and the rule of lenity where statutes are found to be amgibuous. The majority opinion does not pay heed to the difference in language between paragraph 3 of Section 2314 and the language used in Section 2315, nor does it pay heed to the legislative history of these sections.[13]

The Court of Appeals for the Third Circuit, in order to find that the Act applies to the interstate transportation of unforged checks, relies on cases construing the language of Section 2315 of Title 18, a companion section of the National Stolen Property Act. The court also relies on cases construing other paragraphs in Section 2314 dealing with stolen goods, *e.g., United States v. Ajlouny,* 629 F.2d 830 (2nd Cir. 1980) *cert. denied,* 101 S.Ct. 920 (1981); *United States v. Tobin,* 576 F.2d 687 (5th Cir.) *cert. denied,* 439 U.S. 1051 (1978); *United States v. Garber,* 626 F.2d 1144, (3rd Cir. 1980). None of these cases construe the language of the third paragraph of Section 2314 with regard to the interstate transportation of forged checks.

Section 2315 provides that it shall be a crime to knowingly receive or deal in various types of goods or securities, "moving as, or which are a part of, or which constitute interstate or foreign commerce, ..." The language used in Section 2315 dealing with the interstate commerce element is obviously different in meaning and scope than that employed in Section 2314. To construe the language identically is to give no weight to the aim of the drafter of these statutes.

[13]See Section A of this brief.

The court of appeals, in its opinion, may have begun its reasoning on a false premise, *i.e.*, that the essence of the offense is the fraudulent scheme itself, and the interstate element is only included to provide a constitutional basis for the exercise of federal jurisdiction (J.A. 82). Admittedly, there is some support for this proposition. *See United States v. Ludwig*, 523 F.2d 705, 707 (8th Cir. 1975), *cert. denied*, 423 U.S. 1076 (1976); *United States v. Roselli*, 432 F.2d 879, 891 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971).

Other courts, however, have construed the statute as prohibiting interstate transportation of goods having unlawful qualities, *Gilinsky v. United States*, 368 F.2d 487, 490 (9th Cir. 1966); *Lyda v. United States*, 279 F.2d 461, 464 (5th Cir. 1960); *Loman v. United States*, 243 F.2d 327, 328-329 (8th Cir. 1957).

This Court stated in *Sheridan, supra*, that the statute was aimed at assisting the states in apprehending criminals engaged in fraudulent activities. However, it is by no means clear that Congress wished to assert jurisdiction over every forger who rides on an interstate highway, or over every forger who may have contemplated taking an out-of-state trip some time before, during or after his possession of the blank check.[14]

As pointed out by Judge McKay in his dissent in *United States v. Sparrow*, 614 F.2d 229, 235, rev'd, 635 F.2d 794 (10th Cir. 1980) (in banc) (per McKay, J.):

> "If, as the majority asserts, the 'essence of the offense' under § 2314 is only the fraudulent scheme, . . .

[14]The court of appeals ignores the presumption that has existed since 1822 that an instrument was forged where it was first found in its altered state or uttered. *United States v. Britton*, C.C.D. Mass. 1822, 24 Fed.Cas. 1239, 1241 (No. 14,650); *United States v. Owens, supra*, 460 F.2d at 469; *United States v. Lee, supra*, 485 F.2d at 44.

> any violation of a local law could become a federal offense merely by the incidental interstate travel of a perpetrator before, after or during the criminal activity. This concept, though interesting, is contrary to the weight of authority."

Even assuming that Congress intended by the National Stolen Property Act to make the essence of the offense the fraudulent scheme, it does not follow that courts are justified in construing the plain language of paragraph 3 of Section 2314 to accomplish this purpose. As was said by Judge McKay in *Sparrow, supra,* in his panel dissenting opinion, 614 F.2d at 236:

> "The statute by its terms prohibits 'transport[ing] in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities,' 18 U.S.C. §2314, not the forging or altering of securities which have been transported interstate. The place where the scheme is conceived or where its ultimate impact will fall is not made important by the statute. A broad congressional intent to ferret out the evils of theft and fraud wherever they lurk, even if unequivocally established, is not determinative. A criminal defendant can suffer the penalties of a statute only when his conduct satisfies the specific terms used in the statute. The rule is clear that a criminal statute is limited to its terms; it 'must be strictly construed and any ambiguity must be resolved in favor of lenity.'" (Citations omitted.)

Moreover, as pointed out by Judge Higginbotham, in his dissent (J.A. 99):

> "Thus, the question we must address is not whether the federal government could have prosecuted McElroy under the Act for his actions, which it clearly could, but whether the specific section under which McElroy was indicted reached that activity.

"On this question I believe there is some ambiguity. The wording of the section suggests, as other courts have held, that it is a forged check that must be transported across state lines, not a check that is later forged. Under the majority's analysis, on the other hand, if one individual transported an unforged check across state lines and handed it to a second person, who forged the check and carried it across the street, the second person could be convicted of *transportation* of a forged check in interstate commerce. This is a reasonable interpretation, but not the most apparent.

"The majority's analogy to Section 2315 is not determinative. Section 2315 holds individuals liable for 'receiving,' 'selling,' or 'storing' a forged security 'moving as, or which is part of, or which constitute, interstate commerce.' Unlike the act of 'transportation,' the 'sale,' 'receipt' or 'storage' of forgeries obviously cannot occur, except in unusual circumstances, across state lines. Thus, a broader interpretation of the special clause included in that section—'moving as, or which is part of, or which constitute'—is logical. No such broad interpretation is impelled by the language of Section 2314. Because criminal statutes must be 'resolved in favor of lenity,' I would interpret the prohibition on transporting a forged check in interstate commerce under Section 2314 to require movement of the forged check across state lines. Thus, as I see it, the district court judge's charge on Counts One and Three was improper." (Emphasis in original.)

There are strong policy reasons for not adopting the approach advocated by the Court of Appeals for the Third Circuit.

The first is the policy behind the rule of lenity in construing a criminal statute; that the statute should give fair warning to the world in language that "the common world will understand," *McBoyle v. United States, supra,* 283 U.S. at 27,

and that, because of the seriousness of criminal penalties, the legislature and not the courts should clearly define criminal activity. *See United States v. Bass, supra,* 404 U.S. at 348.

The second is that by the broad reading of this statute the Federal Government could disturb the delicate balance in the federal-state relationship. *See United States v. Bass, supra,* 404 U.S. at 349. Obviously, here the states have requested asistance, but under the majority opinion, the assistant would become the master in all criminal cases involving forgeries. This delicate balance should not be disturbed without clearly spoken mandate from Congress. *Id.*, at 350.

While there may be little doubt that Congress could expand the authority of the Federal Government over the entire field of criminal fraud through the commerce clause, petitioner submits that Congress has not indicated any desire to do so by this statute.

D. Congressional Inaction After Decisions By The Courts of Appeals Indicated An Acceptance Of the Construction Placed on the Statute By the Petitioner.

As early as 1961, the Fifth Circuit, in *Castle v. United States,* 287 F.2d 657 (5th Cir. 1961) indicated in dicta that no federal offense under Section 2314 would be cognizable unless the forgery took place before being transported from one state to another. The court said:

> "The statements made that evening by appellant, while inviting suspicion and suggesting inquiry, and perhaps constituting a confession of the theft of blank money order forms, did not admit the commission of a federal offense as it did not then appear, from the

appellant's statements or otherwise, that the money order forms had been converted into falsely made and forged securities before being transported from one state to another." 287 F.2d at 661.

In 1972 the Court of Appeals for the Fifth Circuit held that the checks must be in a forged condition prior to their interstate transportation. *United States v. Owens,* 460 F.2d 467, 469 (5th Cir. 1972). In 1976, the Eighth Circuit joined the Fifth Circuit in its construction of the statute, *United States v. Hilyer,* 543 F.2d 41, 43 (8th Cir. 1976). Finally, in 1980, the Tenth Circuit also adopted the same construction, *United States v. Sparrow,* 635 F.2d 794, 796 (10th Cir. 1980) (in banc).

Therefore, in light of congressional inaction in the face of such clear holdings by the courts, this Court may presume that these interpretations met with congressional approval. *See, e.g., Electric Storage Battery Co. v. Schmadzu,* 307 U.S. 5, 14 (1939); *Missouri v. Ross,* 299 U.S. 72, 75 (1936).

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be reversed and a judgment of acquittal ordered to be entered.

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